

Legal Questions Act
R.S.C.

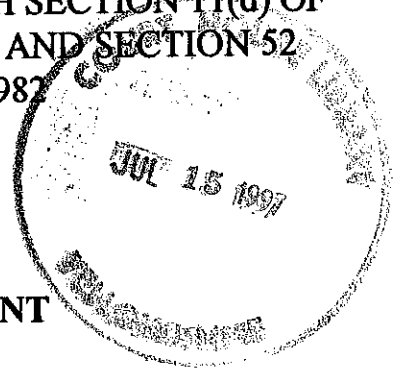
SC CV 97 016

Date: 1997 06 26
Docket: CV 07082

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF SECTIONS 2 AND 3 OF THE
LEGAL QUESTIONS ACT, R.S.N.W.T. 1988, c.L-3

AND IN THE MATTER OF A REFERENCE BY THE MINISTER OF JUSTICE
OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES
CONCERNING WHETHER SECTION 6(2) OF THE **TERRITORIAL COURT
ACT**, R.S.N.W.T. 1988, c.T-2 IS CONSISTENT WITH SECTION 11(d) OF
**THE CHARTER OF RIGHTS AND FREEDOMS AND SECTION 52
OF THE CONSTITUTION ACT 1982**



MEMORANDUM OF JUDGMENT

[1] This is a proceeding under the *Legal Questions Act*, R.S.N.W.T. 1988, c.L-3. The Court is asked by the Minister of Justice to give an opinion on the constitutional validity of certain provisions of a statute enacted by the Legislative Assembly of the Northwest Territories. This memorandum deals solely with certain preliminary matters raised by proposed parties to the Reference.

[2] The matter being referred to this Court is the constitutional validity of s.6(2) of the *Territorial Court Act*, R.S.N.W.T. 1988, c.T-2:

6.(1) The Commissioner may appoint such qualified persons to be deputy territorial judges as the Commissioner considers necessary for the due administration of justice in the Territories.

(2) An appointment under subsection (1) shall have effect for a period of two years or for a shorter period as may be specified in the appointment, unless sooner revoked by the Commissioner on the written recommendation of the Chief Judge.

(3) The Commissioner may reappoint a deputy territorial judge.

3523

(4) A deputy territorial judge has all the powers, duties and functions of a territorial judge appointed under subsection 4(2).

[3] The Minister says that it is his intention to recommend that the Commissioner appoint a full-time deputy judge for a fixed term of two years pursuant to s.6 of the *Territorial Court Act*, and because of certain concerns raised by the Chief Judge of the Territorial Court, the Honourable R.W. Halifax, the Minister seeks the opinion of this Court on the matter. The Minister has notified the Chief Judge, the Attorney General of Canada and the Law Society of the Northwest Territories that he is referring the matter to this Court.

[4] Three parties now appear and seek status under s.4 of the *Legal Questions Act*. This latter provision reads:

4. The Supreme Court may direct that

- (a) any person interested, or
 - (b) where there is a class of persons interested, any one or more persons as representatives of that class,
- shall be notified of the hearing, and those persons shall be entitled to be heard.

[5] Those seeking status are a) the Chief Judge, b) the Law Society and c) the Territorial Judges' Association. The Attorney General of Canada did not appear in response to notification to her, and presumably takes no position on the matter being referred.

[6] The Law Society and the Judges' Association take no particular position on the matter being referred; however, their respective counsel say they each are a "person interested" and wish to be notified of the hearing of the Reference, and to be heard at the hearing, as appropriate.

[7] The Chief Judge, through counsel, makes a formal preliminary motion for an Order determining:

- a) the terms and extent of participation in the Reference by the Chief Judge, and

- b) the terms as to the costs to be incurred by the Chief Judge.

[8] Counsel for the Chief Judge advises that he does wish to place argument before this Court regarding the constitutionality of s.6(2) of the *Territorial Court Act* in the context of the full-time appointment of a deputy judge for a fixed term.

[9] On this preliminary motion, the Court is asked by the Chief Judge to confirm that his proposed participation as a party to the Reference shall include:

- a) the right to notice of all steps,
- b) the right to adduce evidence and to cross-examine the Minister's witnesses,
- c) the right to raise and argue all relevant issues, including any issue not appearing within the express words of the legal question being referred,
- d) the right to file written argument and make oral argument,
- e) the right to apply for costs, and
- f) the right of appeal.

[10] Assuming that the Chief Judge is a "person interested" within s.4 of the *Legal Questions Act* (which I discuss below), I see no difficulty in granting the requested participation, save for the *proviso*, with respect to (b) and (c) above, that those matters will be specifically determined by a judge of this Court presiding on a motion relating thereto, or on the main hearing of the Reference itself. And it is the Court of Appeal, of course, which will make the real determination on (f) above.

[11] In order for the Chief Judge to have status under s.4 of the *Legal Questions Act*, he must be a "person interested" in the Reference. Given the background information provided by the Minister's counsel of the steps leading to this Reference, and upon hearing the submissions made on behalf of the Chief Judge as to the responsibilities of his office, I am satisfied that the Chief Judge is a "person interested", using the ordinary plain meaning of those words. The Minister has no objection to the Chief Judge being so described, nor to the Chief Judge's participation in the Reference.

[12] [I do not find, however, that the Chief Judge is a person "directly affected" in the same sense as the interested parties granted status in the cases cited by counsel for the Chief Judge, i.e., *Reform Party of Canada v Attorney General of Canada* (1992) 136 A.R.1 (Alta.Q.B.); *Law Society of Upper Canada v Skapinker* (1984) 11 C.C.C.(3d) 481 (S.C.C.); *Hirt v College of Physicians and Surgeons of British Columbia* (1985) 60 B.C.L.R. 131 (C.A.); *Re K and M et al* (1990) 70 D.L.R.(4th) 727 (Alta.C.A.).]

[13] For the foregoing reasons I am satisfied that there is merit in the first aspect of the Chief Judge's preliminary motion. The second aspect, in which he seeks an order of this Court now which would direct the Minister of Justice to pay the Chief Judge's legal expenses throughout this proceeding, is another matter.

[14] There is no specific provision for such an Order in the *Legal Questions Act*, as there is in similar legislation in some of the provinces.

[15] I note, for example, the specific provision contained in the Prince Edward Island legislation. The statutory regime for a reference by the Executive arm of government of a legal question for the opinion of the Court is set forth in s.18 of the *Supreme Court Act* R.S.P.E.I. 1977, c.S-10. Subsections (5) and (6) provide as follows:

(5) The court may direct that any person interested, or any one or more persons as representatives of a class of persons interested, be notified of the hearing and be entitled to make submissions to the court.

(6) Where any interest affected is not represented by counsel, the court may request the Attorney General to appoint counsel to argue on behalf of the interest, and the reasonable expenses thereof shall be paid out of the Consolidated Fund.

For cases where this specific authority was invoked, see *Reference Re Human Rights Act* (1987) 43 D.L.R.(4th) 518 (P.E.I.S.C.App.Div.) and *Reference Re Independence of the Judges of Provincial Court* (1995) 124 D.L.R.(4th) 528 (P.E.I.S.C.App.Div.).

[16] Here in this jurisdiction, there is no equivalent authority to s.18(6) of the P.E.I. statute.

[17] Even if the Court had an inherent jurisdiction to direct in advance that the Commissioner or the Minister pay the legal expenses of a "person interested" in a Reference case under the *Legal Questions Act* (and I remain uncertain that there is such an inherent jurisdiction - I find merit in the reasoning in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee Inc. et al*, (1985) 19 D.L.R.(4th) 356 (Ont.Div.Ct.) although that case is admittedly distinguishable on its facts) I have not been convinced that such an Order should issue in this proceeding for the benefit of the Chief Judge.

[18] Counsel for the Chief Judge also made submissions for the payment of his legal expenses in advance on a different footing, by relying on Rule 92 of the Rules of Court:

92. With leave of the Court, a person may intervene in a proceeding, without becoming a party to the proceeding, as *amicus curiae* for the purpose of rendering assistance to the Court by way of argument or by presentation of evidence, on such terms as to costs or otherwise as the Court may impose. (Emphasis added)

[19] Seeking leave to intervene *amicus curiae*, however, is quite different than seeking status as an interested person under s.4 of the *Legal Questions Act*. The purpose of intervention *amicus curiae* is to provide assistance to the Court (and usually at the invitation of the Court). Such assistance is sometimes required by the Court where one side of an argument on an issue is not being presented to the Court. *Borowski v Minister of Justice of Canada* [1983] 3 W.W.R.505 (Sask.Q.B.).

[20] In the present case, the Chief Judge states through his counsel that he will present the "other side" of the argument being advanced on behalf of the Minister. There will thus be no failure of presentation of issues before the Court, and the Court will not be in need of an *amicus*.

[21] In my respectful view, there is an inconsistency in seeking both s.4 status under the *Legal Questions Act* and to intervene *amicus curiae*. A true *amicus* is not a party to the proceeding, has no interest in the proceeding, but, rather, is a mere

“friend” of the Court. A person or party applying for status under s.4 has, by definition, an interest in the proceeding itself. In the unique circumstances of this case, the Chief Judge is not a total stranger to the proceeding, as counsel have so advised the Court on this preliminary motion.

[22] For these reasons I find that whereas the Chief Judge meets the criteria for status under s.4 of the *Legal Questions Act*, Rule 92 is not applicable to the relief sought on this motion.

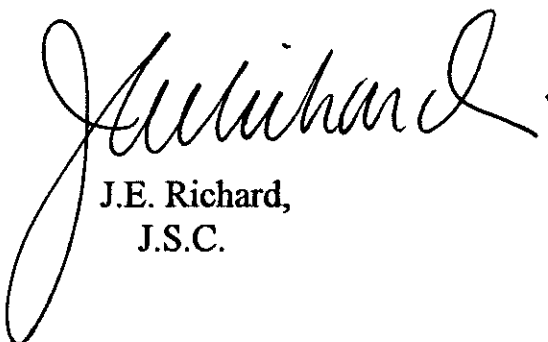
[23] Accordingly, the matter of the Chief Judge’s legal expenses must await the conclusion of this proceeding under the *Legal Questions Act*, for determination by the presiding judge.

[24] An order will issue as follows:

1. The Chief Judge of the Territorial Court, the Law Society of the Northwest Territories, and the Territorial Judges’ Association shall be notified of the hearing of the question referred by the Minister, and shall be entitled to be heard, pursuant to s.4 of the *Legal Questions Act*.
2. Subject to final determination by the presiding judge, counsel representing the Chief Judge shall also have the right to adduce evidence, cross-examine witnesses, raise any relevant issue, and apply for costs.
3. The application for a direction to the Minister of Justice to pay the legal expenses of the Chief Judge throughout this proceeding is denied, without prejudice to any claim the Chief Judge may make for costs at the conclusion of the proceeding.

[25] Counsel are at liberty to make written submissions with respect to costs of this motion, at any time within 30 days of the date these reasons are filed.

With respect to the proceeding itself, counsel should arrange with the Clerk of the Court for a special Chambers date for the purpose of settling the manner in which the Court will hear and consider the legal question referred by the Minister.



J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 26th day of June 1997

Counsel for the Minister of Justice: Earl D. Johnson, Q.C.
Counsel for the Chief Judge of the Territorial Court: Chris Evans, Q.C.
Counsel for the Law Society of the N.W.T.: Charles McGee
Counsel for the Territorial Judges' Association: Robert Gorin

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

IN THE MATTER OF SECTIONS 2 AND 3 OF
THE *LEGAL QUESTIONS ACT*, R.S.N.W.T.
1988, c.L-3

AND IN THE MATTER OF A REFERENCE BY
THE MINISTER OF JUSTICE OF THE
GOVERNMENT OF THE NORTHWEST
TERRITORIES CONCERNING WHETHER
SECTION 6(2) OF THE *TERRITORIAL
COURT ACT*, R.S.N.W.T. 1988, c.T-2 IS
CONSISTENT WITH SECTION 11(d) OF *THE
CHARTER OF RIGHTS AND FREEDOMS*
AND SECTION 52 OF THE *CONSTITUTION
ACT* 1982

MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE J. E. RICHARD

